Appendix A

Opinion of the Court of
Appeals Below

NO. 75-1422

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

OCT 17 1975

JOHN P. HEHMAN, Clerk

GREGORY Y. LAU

Plaintiff-Appellant

v.

WILLIAM SAXBE, Acting Attorney General of the United States;
LEONARD F. CHAPMAN, JR., Commissioner of Immigration and Naturalization Service; and
S. F. PERRYMAN, District Director of Immigration and Naturalization Service at Cleveland

Defendants-Appellees

ORDER

BEFORE: PHILLIPS, Chief Judge; MARKEY, Chief Judge of the Court of Customs and Patent Appeals*; and LIVELY, Circuit Judge.

This is an appeal from the denial of discretionary relief in deportation proceedings. The appellant does not appeal from the deportation order, but maintains that the District Director of Immigration and Naturalization Service abused his discretion in failing to grant appellant a further postponement of his departure date after deportation had been ordered and a voluntary departure date had been agreed upon. It is appellant's position that the

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*The Honorable Howard T. Markey, sitting by designation.

District Director was required to give reasons for his denial of discretionary relief and that such denial should be treated as wholly arbitrary in the absence of a statement or explanation by the District Director of his denial. It is appellant's position that the undisputed evidence shows that he is a person of good character who is making a valuable contribution to the community in which he lives and that in the face of such a showing the District Director has abused his discretion in denying further postponement of his departure.

Appellant has produced no authoritative holding which supports his position in this case, and we have found none. The District Judge filed a comprehensive opinion and order which we believe properly disposes of all of the issues raised on appeal. Accordingly, the judgment of the district court is affirmed for the reasons set forth in the opinion and order of District Judge Robert M. Duncan entered on February 21, 1975.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

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Appendix B

Opinion of the District Court Below

FILED
JOHN D. LYTER, CLERK
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U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

Gregory Y. Lau,	:	
Plaintiff	:	
v.	:	Civil Action No. 75-62
William Saxbe, et al.,	:	
Defendants	:	

OPINION AND ORDER

Plaintiff, a citizen of Hong Kong, Commonwealth of Great Britain, has been an alien resident of the United States since he entered this country in 1969 on a student (F-1) visa. This visa was renewed on several occasions and finally expired on June 23, 1974. On June 19, 1974, plaintiff filed with the Office of Immigration and Naturalization Service (INS) in Cincinnati, Ohio, a Form I-538 application for extension of stay. Paragraph 14 of the amended complaint alleges that defendants "failed and refused to respond" to this application; the Form I-538 itself, Government's Exhibit 1 (hereinafter, "Exhibit") at page 2, reflects that the application was denied on August 21, 1974.

On October 24, 1974, a deportation hearing was held at which plaintiff conceded that he was in the country beyond the date permitted by his student visa. Exhibit at 18. Plaintiff sought and obtained permission to leave the country voluntarily, and he waived his right to appeal the hearing officer's decision that he was a deportable alien. Exhibit at 15-14. He was ordered to leave the country voluntarily by December 31, 1974, in lieu of being deported.

On November 14, 1974, plaintiff filed a Form MA-750-A "Petition to Classify Preference Status of Alien on Basis of Profession or Occupation" and an accompanying "Statement of Qualifications of Alien." Exhibit at 34-29A. Paragraph 22 of the amended complaint alleges that defendants "failed and refused to respond" to this application. The record reflects, Exhibit at 44, that the Department of Labor determined on January 8, 1975, that plaintiff's education, which consists of a Bachelor of Arts degree from Capital University, Columbus, Ohio, an intensive one-month course in respiratory therapy at the University of Chicago, and some instruction in advanced respiratory therapy at the Columbus Technical Institute, did not qualify plaintiff for a preference priority under 18 U.S.C. §1153(a)(3).

On December 23, 1974, plaintiff requested through counsel an extension of time in which to depart, Exhibit at 39-38. In a letter dated December 26, 1974, defendant Perryman, District Director, informed plaintiff that

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> in accordance with my decision in this case, you have been granted an extension of the Immigration Judge's order to January 31, 1975. Be further advised that this is a final extension of this privilege of voluntary departure and should you fail to depart by that date, a Warrant of Deportation will be considered in your case along with arrangements by this Service to effect your deportation to Hong Kong.

Exhibit at 40.

In a letter dated January 8, 1975, Richard Kowalchik, Deportation Officer, responded to plaintiff's counsel's letter of December 23, 1974. This letter provided as follows:

> Please be advised that your client has been granted an extension of the Immigration Judge's order to January 31, 1975. Please refer to this Service's letter to Mr. Lau dated December 26, 1974. Be further advised that if the petition he filed with this Service on November 20, 1974, for third preference classification was approved, he would not be considered for immediate immigrant visa issuance as visa allotments under the third preference category in this instant case are unavailable. It is our further understanding that there has been no visa allotments under this third preference category for natives of Hong Kong since 1966. Furthermore, there is no authority under current regulations to allow Mr. Lau to remain in the United States for an indefinite time to await an immigrant visa on the basis of an approved petition.
>
> If Mr. Lau does not depart from the United States within the time alloted him, a Warrant of Deportation will be considered along with arrangements by this Service to effect his deportation to Hong Kong.

Exhibit at 42-41.

On January 20, 1975, plaintiff wrote defendant Perryman a letter requesting a re-evaluation of his case. On January 27, 1975, Mr. Kowalchik replied:

> You are again advised that at a hearing in deportation proceedings on October 24, 1974, the Immigration Judge found you deportable pursuant to Section 241(a)(2) of the Immigration and Nationality Act, as amended, in that after admission as a nonimmigrant under Section 101(a)(15) of said Act, you remained in the United States for a longer time than permitted. You were granted voluntary departure without expense to the Government to December 31, 1974, with this privilege having been extended to January 31, 1975.
>
> In accordance with your listed departure arrangements, you are directed to surrender the Form I-94, Arrival-Departure Record, to the transportation line at your final United States port, which from your arrangements, would be the China Airlines at Los Angeles, California.

Exhibit at 48.

On January 30, 1975, plaintiff filed this action, alleging his imminent and illegal deportation from this country. The Court upon notice to the parties issued a preliminary injunction prohibiting the removal of the plaintiff from this judicial district. A trial on the merits was held on February 14, 1975. On February 18, 1975, the Court renewed, pending a decision on the merits of this case, its order prohibiting plaintiff's removal from this judicial district.

On February 5, 1975, during the pendency of this action, yet another request for postponement of the voluntary departure date was filed. The record does not reflect the disposition of this particular request.

Plaintiff does not challenge in this action the finding, made at the close of the October 24, 1974 hearing, that he is present in this country after the expiration of his student visa and is therefore a deportable alien. As was noted hereinbefore, during that hearing he conceded his deportability and he waived on the record of that proceeding his right to appeal that finding. Moreover, appeal from such a finding lies not with this Court but with the Court of Appeals. 8 U.S.C. §1105a. Plaintiff's status as a deportable alien having been finally adjudicated against him, he brought this action alleging not that he has a lawful right under the immigration laws to remain in this country but rather that the defendant District Director Perryman has abused his discretion in failing to grant more than one postponement of plaintiff's departure date. Defendants admit at paragraph 2 of their answer that this Court has jurisdiction pursuant to 28 U.S.C. §§1361 (mandamus), 2201 (declaratory judgment) and 2241 (habeas corpus) to entertain an action in which it is alleged that a district director of the Immigration and Naturalization Service has abused his discretion in refusing to grant discretionary relief. See Cheng Fan Kwok v. Immigration and Naturalization Service, 392 U.S. 206 (1968); Shaughnessy v. Pedreiro, 349 U.S. 48 (1955).

At trial plaintiff presented several witnesses who are employed at the Children's Hospital and Doctor's Hospital in Columbus, Ohio. These witnesses testified that plaintiff is employed full-time at both of these hospitals and that he works in the allied medical field of respiratory therapy. It was further established at trial that there exists a shortage of such therapists in the Columbus area and that plaintiff, as a skilled respiratory therapist, serves as a highly-valued paramedical employee at both of these Columbus hospitals. Plaintiff insists that the Columbus area has much to lose, and the United States little to gain, if he is deported.

As developed at oral argument during the trial, plaintiff's contention that District Director Perryman abused his discretion in refusing plaintiff a second postponement of departure date is essentially two-pronged: (1) it is alleged that failure to give plaintiff notice of discretionary decisions by the district director, when such notice is required by the Code of Federal Regulations, is an abuse of discretion; and (2) it is alleged that the refusal of the district director to grant further postponements of plaintiff's departure date, when examined in light of the peculiar facts of this case, was an abuse of discretion.

I find no abuse of discretion by defendant Perryman regarding the giving of notice to plaintiff of agency decisions. The correspondence contained in Government's Exhibit 1, which correspondence is outlined hereinabove, indicates that plain-

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tiff was neither misled nor uninformed by the INS concerning his status as an alien. See, e.g., defendant Perryman's December 26, 1974 letter to plaintiff, Exhibit at 40, and Deportation Officer Kowalchik's January 8, 1975 letter to plaintiff's counsel, Exhibit at 42-41.

Further, as to the giving of notice by the INS to an applicant for an extension of time in which to voluntarily depart, 8 C.F.R. §243.4 provides, in part, as follows:

> Written notice of the disposition of the alien's request shall be served upon him, but neither the making of the request nor the failure to receive notice of the decision thereon shall relieve or excuse the alien from presenting himself for deportation at the time and place designated for his deportation.

See also 8 C.F.R. §§103.5 and 242.22. These sections of the regulations adequately place a person subject to deportation on notice that a last minute flurry of petitions and requests for discretionary relief, such as re-opened hearing and stays of deportation deadlines, will not operate to extend the alien's deportation date, unless, of course, such petitions and requests are approved by the INS prior to the deportation date. I therefore find that the alleged lack of notice to plaintiff of certain discretionary INS determinations did not prejudice him in any way, did not operate to extend his date for voluntary departure, and did not constitute an abuse of discretion by any of the defendants.

Plaintiff's second premise is that the district director abused his discretion in refusing to delay plaintiff's departure date because there was no evidence before the director of plaintiff having bad moral character and there was undisputed evidence before him that plaintiff, as a skilled and competent respiratory therapist, is a greatly needed member of the Columbus, Ohio, community. Plaintiff cites no authority for his proposition that these factors are the relevant criteria which the district director should apply in a case involving an alien whose presence in the country was under a student visa and whose status as a student has been terminated. Mr. Kowalchik explained in his January 8, 1975 letter to plaintiff's counsel that INS could perceive no authority under the immigration laws for plaintiff's continued presence in the country after the expiration of his student visa. The regulations provide only that the district director "may grant a stay of deportation for such time and under such conditions as he may deem appropriate." 8 C.F.R. §243.4. It certainly constitutes no abuse of discretion to deny a stay of deportation when under the immigration laws enacted by Congress there exists no foreseeable way for the applicant to effect a change in his status as a deportable alien. This is doubly so in a case such as this, where the district director did in fact exercise his discretion once by extending plaintiff's deportation date from December 31, 1974, to January 31, 1975. This extension should have served to provide plaintiff's employers with an additional period of time in which to

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seek a replacement for plaintiff or to adjust their staff schedules accordingly. In view of the expiration of his student status and in view of the unavailability of other visa allotments for plaintiff, his application for a six-month delay of departure time was more in the nature of an attempt to circumvent the immigration laws than an application directed to the sound discretion of the district director. The Court finds no abuse of discretion in the district director's refusal to delay the deportation date beyond January 31, 1975.

With regard to plaintiff's November 14, 1974 "Petition to Classify Preference Status of Alien on Basis of Profession or Occupation," any error in the Department of Labor's determination that plaintiff's training did not entitle him to an 8 U.S.C. §1153(a)(3) preference priority, and any error in the district director's reliance upon that determination, is rendered harmless by the fact that no visa allotments were available to plaintiff under this preference provision. See Exhibit at 42.

The Court having determined that no abuse of discretion occurred in this case, the Clerk will enter judgment for defendants. The injunction entered herein on February 18, 1975, prohibiting defendants from removing plaintiff from this judicial district will remain in effect through Friday, February 28, 1975, and no longer. The Court will not entertain any further motions for stay of this order.

Robert M. Duncan /s/